

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 EDWARD MAKARON, on behalf of) Case No. CV 15-05145 DDP (Ex)
himself and all others)
12 similarly situated,)
13 Plaintiff,) **ORDER GRANTING PLAINTIFF'S MOTION**
14 v.) **FOR CLASS CERTIFICATION**
15 ENAGIC USA, INC.,) [Dkt. No. 78]
16 Defendants.)
17 _____)
18)

Presently before the court is Plaintiffs' Motion for Class Certification. Having considered the submissions of the parties and heard oral argument, the court grants the motion and adopts the following Order.

I. Background

Defendant Enagic USA, Inc. ("Enagic") is a "direct selling company" that markets alkaline water filtration and ionization systems. Enagic does not sell devices to consumers in the United States directly, but instead utilizes a network of thousands of

1 distributors. The parties dispute whether these distributors are
2 independent contractors or are controlled by Enagic.

3 On May 18, 2015, Plaintiff received a call on his cell phone.
4 (Declaration of Edward Makaron ¶ 3.) When Plaintiff answered the
5 call, he heard a 22-minute prerecorded phone message encouraging
6 him to purchase an Enagic water machine and to become a
7 distributor. (Makaron Decl. ¶ 3, Ex. M-2.) Two days later,
8 Plaintiff received a phone call from Gary Nixon, who tried to
9 convince Plaintiff to purchase an Enagic product and recruit
10 Plaintiff to be an Enagic salesperson. (Makaron Decl., ¶¶ 7-9.)

11 Under the Telephone Consumer Protection Act ("TCPA"), it is
12 unlawful "to make any call . . . using any automatic telephone
13 dialing system or an artificial or prerecorded voice . . . to any .
14 . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A). It is
15 also unlawful to initiate a phone call to a residential phone line
16 with an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(B).
17 Plaintiff represents that he has obtained information from third
18 party calling services, including Phone Prospector and Phone
19 Burner, that three of the thousands of distributors associated with
20 Defendant made over fifteen thousand phone calls using third party
21 phone dialing systems. Plaintiff's Second Amended Complaint
22 alleges that Engagic and/or its distributors, who are alleged to be
23 Enagic's agents, called Plaintiff's cell phone with an automatic
24 dialing system and played a pre-recorded message, in violation of
25 the TCPA. Plaintiff now moves to certify a class under Federal
26 Rule of Civil Procedure Rule 23(b)(2) and 23(b)(3) comprised of
27 "[a]ll persons within the United States who received a telephone
28 call from Defendant or one of its Distributors, on said Class

1 Member's telephone made through the use of any automatic telephone
2 dialing system or an artificial or prerecorded voice, between July
3 8, 2011 and Present," as well as various related subclasses.

4 **II. Legal Standard**

5 The party seeking class certification bears the burden of
6 showing that each of the four requirements of Rule 23(a) and at
7 least one of the requirements of Rule 23(b) are met. See Hanon v.
8 Dataprods. Corp., 976 F.2d 497, 508-09 (9th Cir. 1992). Rule 23(a)
9 sets forth four prerequisites for class certification:

10 (1) the class is so numerous that joinder of all members is
11 impracticable, (2) there are questions of law or fact common to the
12 class, (3) the claims or defenses of the representative parties are
typical of the claims or defenses of the class, and (4) the
representative parties will fairly and adequately protect the
interests of the class.
13 Fed. R. Civ. P. 23(a); see also Hanon, 976 F.2d at 508. These four
14 requirements are often referred to as numerosity, commonality,
15 typicality, and adequacy. See Gen. Tel. Co. v. Falcon, 457 U.S.
16 147, 156 (1982).

17 In determining the propriety of a class action, the question is
18 not whether the plaintiff has stated a cause of action or will
19 prevail on the merits, but rather whether the requirements of Rule
20 23 are met. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178
21 (1974). This court, therefore, considers the merits of the
22 underlying claim to the extent that the merits overlap with the Rule
23 requirements, but will not conduct a "mini-trial" or determine at
24 this stage whether Plaintiffs could actually prevail. Ellis v.
25 Costco Wholesale Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011);
26 see also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51
27 (2011).

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1 Rule 23(b) defines different types of classes. Leyva v.
2 Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2012). Rule
3 23(b) (2) requires that the party opposing the class "has acted or
4 refused to act on grounds that apply generally to the class" Fed. R. Civ. Proc. 23(b) (2). Rule 23(b) (3) requires that "questions of law or fact common to class members predominate over individual questions . . . and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b) (3).

10 **III. Discussion**

11 As an initial matter, the court observes that Defendant devotes
12 a substantial portion of its written opposition to arguments that
13 are inapplicable to the instant motion. Defendant contends, for
14 example, that "[t]here is no evidence that either Enagic USA or any
15 Enagic distributor used an automated telephone dialing system . . . or recorded voice to place calls in violation of the . . . TCPA" and
16 repeatedly asserts that "Plaintiff presents no evidence of a TCPA
17 violation" (Opposition at 1:3-6, 24; 8:16-18 ("[D]espite
18 having had over 2-years to obtain evidence that such robo or [auto-
19 dialed] calls occurred, . . . the Plaintiff was not able to do
20 so."). A motion for class certification is not, however, a motion
21 for summary judgment or a mini-trial. Ellis, 657 F.3d at 981, 983
22 n.8. Although the merits of a case may overlap with certification
23 questions to some extent, this Court will only look to the merits
24 "inasmuch as it must determine whether common questions exist, not
25 to determine whether class members could actually prevail on the
26 merits of their claims." Id. Furthermore, Defendant's arguments
27 regarding the ascertainability and administrative feasibility of the

1 proposed class (Opp. at 5-10) ignore binding Ninth Circuit
2 authority. Indeed, the Ninth Circuit has explicitly stated that
3 "the language of Rule 23 neither provides nor implies that
4 demonstrating an administratively feasible way to identify class
5 members is a prerequisite to class certification, . . ." and
6 declined to impose any such requirement. Briseno v. ConAgra Foods,
7 Inc., 844 F.3d 1121, 1133 (9th Cir. 2017). Much of Defendant's
8 opposition, therefore, is simply inapt.

9 A. Rule 23(a) Factors

10 i. Numerosity

11 Numerosity is satisfied if "the class is so numerous that
12 joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).
13 The Ninth Circuit has elaborated that "impracticable" does not mean
14 "impossible," and that the appropriate inquiry is whether the
15 difficulty and inconvenience of litigating separate claims would
16 render that course of action impractical. Harris v. Palm Springs
17 Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964)). The
18 "numerosity requirement requires examination of the specific facts
19 of each case and imposes no absolute limitations." Gen. Tel. Co. of
20 the Nw. v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 330
21 (1980). The Ninth Circuit has required at least fifteen members to
22 certify a class, and classes of at least forty members are usually
23 found to have satisfied the numerosity requirement. Harik v. Cal.
24 Teachers Ass'n, 326 F.3d 1042, 1051 (9th Cir. 2003); Davis v. Four
25 Seasons Hotel Ltd., 277 F.R.D. 429, 435 (D. Hawaii 2011).

26 Defendant contends that Plaintiff has failed to demonstrate
27 numerosity because he has done no more than speculate as to the
28 number of putative class members. (Opp. at 20-21.) Indeed, a

1 plaintiff must show at least a reasonable estimate of class members
2 to satisfy Rule 23(a)(1). Nuyen Da Yen v. Kissinger, 70 F.R.D. 656,
3 661 (N.D. Cal. 1976.) To the extent Defendant suggests that
4 Plaintiff is only speculating as to class size because he cannot
5 personally identify any members of the class (Opp. at 21:3),
6 however, that position has no merit. Defendant's remaining
7 contention, that the tens of thousands of calls made by Enagic
8 distributors through third party dialing services such as
9 PhoneBurner are of no moment because those services are "power
10 dialers" rather than "auto dialers" involves questions of fact
11 beyond the scope of a motion for class certification. See 47 U.S.C.
12 § 227(a)(1) ("The term 'automatic telephone dialing system' means
13 equipment which has the capacity (A) to store or produce telephone
14 numbers to be called, using a random or sequential number generator;
15 and (B) to dial such numbers.") (emphasis added). Plaintiff's
16 identification of hundreds of thousands of phone calls made by third
17 party dialing systems on behalf of only a small number of Enagic
18 distributors is a sufficient basis to estimate a class size well in
19 excess of forty members.

20 ii. Commonality

21 Commonality is satisfied if "there are questions of law or fact
22 common to the class." Fed. R. Civ. P. 23(a)(2). However, "[t]he
23 requirements of Rule 23(a)(2) have been construed permissively, and
24 all questions of fact and law need not be common to satisfy the
25 rule." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th
26 Cir.2011) (internal quotation marks and brackets omitted).
27 Nevertheless, common questions must be ones that will "generate
28

1 common answers apt to drive the resolution of the litigation.”
2 Dukes, 564 U.S. at 350.

3 Common factual and legal questions abound here, including
4 questions whether Enagic is liable for its distributors’ actions and
5 whether the third party dialing services used, or qualify as,
6 autodialer equipment. Defendant’s brief argument that distributors
7 may have used different calling methods is not compelling.
8 Plaintiff has identified a small number of third party dialing
9 services, the nature and capabilities of which will likely be
10 relatively simple to determine and generally applicable to all
11 distributors utilizing those services. See, e.g. Caldera v. Am.
12 Med. Collection Agency, 320 F.R.D. 513, 517 (C.D. Cal. 2017); Amini
13 v. Heart Savers, LLC, No. SACV 15-01139 JVS, 2016 WL 10621698 at *3
14 (C.D. Cal. Oct. 17, 2016). Nor is the court persuaded by
15 Defendant’s assertion that questions of individual consent destroy
16 commonality. Although express consent would indeed be a defense to
17 TCPA allegations, 47 U.S.C. § 227(b), Defendant would bear the
18 burden of showing express consent, and has not provided any evidence
19 of such or demonstrated any consent mechanism that might require
20 individualized determinations. See Van Patten v. Vertical Fitness
21 Grp., LLC, 847 F.3d 1037, 1044 (9th Cir. 2017); Stern v. DoCircle,
22 Inc., No. SACV 12-2005 AG, 2014 WL 486262 at *8 (C.D. Cal. Jan. 29,
23 2014); cf. Blair v. CBE Group, Inc., 309 F.R.D. 621, 628 (S.D. Cal.
24 2015) (finding lack of predominance where Defendant provided
25 evidence regarding specific mechanism and record keeping regarding
26 consent); Connelly v. Hilton Grand Vacations Co., LLC, 294 F.R.D.
27 574, 578 (S.D. Cal. 2013) (same); see also Satterfield v. Simon &

1 Schuster, Inc., 569 F.3d 946, 955 (9th Cir. 2009) (explaining
2 express consent).

3 iii. Typicality and Adequacy

4 Typicality is satisfied if "the claims or defenses of the
5 representative parties are typical of the claims or defenses of the
6 class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality
7 requirement is to assure that the interest of the named
8 representative aligns with the interests of the class. Typicality
9 refers to the nature of the claim or defense of the class
10 representative, and not to the specific facts from which it arose or
11 the relief sought. The test of typicality is whether other members
12 have the same or similar injury" Hanon v. Dataproducts
13 Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks
14 omitted) (citations omitted). Adequacy of representation is
15 satisfied if "the representative parties will fairly and adequately
16 protect the interests of the class." Fed. R. Civ. P. 23(a)(4).
17 Inasmuch as it is conceptually distinct from commonality and
18 typicality, this prerequisite is primarily concerned with "the
19 competency of class counsel and conflicts of interest." Gen. Tel.
20 Co. of Southwest v. Falcon, 457 U.S. 147, 158 n.13 (1982). Thus,
21 "courts must resolve two questions: (1) do the named plaintiffs and
22 their counsel have any conflicts of interest with other class
23 members and (2) will the named plaintiffs and their counsel
24 prosecute the action vigorously on behalf of the class?" Ellis, 657
25 F.3d at 985.

26 Defendant's arguments regarding typicality and adequacy center
27 on Plaintiff's inability to recall certain details at his
28 deposition, and are not well taken. Defendant points out, for

1 example, that Plaintiff could not recall whether he received a phone
2 call from Enagic itself, had no knowledge of Enagic's policies
3 regarding auto dialers, and did not know whether Enagic has
4 agreements with third party dialing services. (Opposition at 16-
5 17.) Defendant further claims that Plaintiff's lack of recollection
6 mean that he lacks standing to pursue an individual claim, let alone
7 represent a class. (Id. at 17-18.) It is unclear to the court,
8 however, how any of Plaintiff's supposed failings are pertinent to
9 the nature of his claims or give any indication that he would not
10 vigorously represent the interests of absent class members, let
11 alone implicate questions of standing. Plaintiff could not
12 reasonably be expected to have personal knowledge of Enagic's own
13 business practices and, more importantly, has never asserted that he
14 received any type of call from Enagic directly. He claims, rather,
15 that he and the other members of the putative class received
16 improper calls from Enagic distributors. This is sufficient to
17 confer standing, and this Court can see no reason why Plaintiff's
18 claims are not typical of the class nor why Plaintiff or his counsel
19 cannot adequately represent the interests of absent class members.

20 See Van Patten, 847 F.3d at 1043.

21 B. Rule 23(b) factors

22 i. Rule 23(b) (2)

23 Rule 23(b) (2) requires that the party opposing the class "has
24 acted or refused to act on grounds that apply generally to the class
25" Fed. R. Civ. Proc. 23(b)(2). The key to a Rule 23(b) (2)
26 class is "the indivisible nature of the injunctive or declaratory
27 remedy warranted--the notion that the conduct is such that it can be
28 enjoined or declared unlawful only as to all of the class members or

1 as to none of them." Dukes, 564 U.S. at 360 (citation omitted).
2 Certification under Rule 23(b)(2) is not appropriate where the
3 primary relief sought is monetary, rather than declaratory or
4 injunctive. Ellis, 657 F.3d at 986.

5 Defendant argues that certification under Rule 23(b)(2) is not
6 appropriate because Plaintiff seeks statutory damages on behalf of
7 the putative class. Defendant appears to ignore, however, that
8 Plaintiff seeks certification of an injunctive class under Rule
9 23(b)(2) and a damages class under Rule 23(b)(3). Courts may, and
10 often do, utilize this type of "hybrid" certification. See, e.g.,
11 Zepeda v. PayPal, Inc., No. C 10-1668 SBA, 2017 WL 1113293 at *17
12 (N.D. Cal. Mar. 24, 2017); Raffin v. Medicredit, Inc., No. CV 15-
13 4912 GHK, 2017 WL 131745 at *10 (C.D. Cal. Jan. 3, 2017).¹
14 Defendant's only other argument is that this case does not involve a
15 common course of action on Enagic's part that might be remedied by a
16 single injunction because Enagic's distributors each formulated
17 their own sales methods. (Opp. at 24.) As discussed above,
18 however, that argument presumes an answer to one of the central,
19 common questions at issue in this case. Should Enagic ultimately be
20 found vicariously liable for the actions of its distributors, the
21 wrongful conduct alleged here can be enjoined with respect to all
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25 ¹ This Court therefore respectfully disagrees with the
26 Connelly court's conclusion that a TCPA class' "parallel request
27 for injunctive" relief cannot be certified under Rule 23(b)(2)
simply because putative class members are also entitled to
statutory damages and named plaintiffs may seek "parallel"
certification of a damages class under Rule 23(b)(3). Connelly,
294 F.R.D. at 579.

1 class members with a single injunction. Certification is therefore
2 appropriate under Rule 23(b)(2).²

3 ii. Rule 23(b)(3)

4 A class action may be certified under Rule 23(b)(3) if a
5 plaintiff shows that "the questions of law or fact common to class
6 members predominate over any questions affecting only individual
7 members, and that a class action is superior to other available
8 methods for fairly and efficiently adjudicating the controversy."
9 Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry
10 tests whether proposed classes are sufficiently cohesive to warrant
11 adjudication by representation." Amchem Products, Inc. v. Windsor,
12 521 U.S. 591, 623 (1997). Predominance "requires a showing that
13 *questions* common to the class predominate, not that those questions
14 will be answered, on the merits, in favor of the class." Amgen Inc.
15 v. Connecticut Ret. Plans & Trust Funds, 568 U.S. 455, 469 (2013).

16 The parties' arguments regarding Rule 23(b)(3) predominance are
17 largely derivative of their other arguments. Plaintiff asserts that
18 because there can be no doubt that use of an auto dialer or a pre-
19 recorded message is a violation of the TCPA, the only real issue in
20 this case is the common question whether Enagic is vicariously
21 liable for the actions of its distributors. Defendant appears to
22 respond that such an inquiry would necessarily involve
23

24 ² Defendant also appears to argue that certification is
25 inappropriate because class members will be entitled to different
26 amounts of statutory damages. (Opp. at 23:18-24.) Although that
27 argument appears more pertinent to a Rule 23(b)(3) analysis than a
28 Rule 23(b)(2) analysis, it is, in any event, not persuasive.
Differences in damages calculations are not obstacles to class
certification. Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d
979, 988 (9th Cir. 2015), Jimenez v. Allstate Insurance Co., 765
F.3d 1161, 1167 (9th Cir. 2014).

1 individualized determinations about Enagic's liability for each
2 separate distributor's actions. (Opp. at 27:8-11.) This argument,
3 however, ignores Plaintiff's theory of the case. Plaintiff does not
4 contend that Enagic is liable for the actions of certain
5 distributors but not others. Rather, Plaintiff contends that Enagic
6 is liable for all of its distributors due to "an employer-employee
7 relationship with its Distributors, direct agency through a high
8 level of control pursuant to standard contracts, or ratification
9 through Enagic's knowledge about robodialing practices"³
10 (Reply at 18:14-17.) These theories implicate common, rather than
11 individualized, questions.

12 Defendant also reiterates that individual questions of class
13 member consent will predominate. Defendant again cites to Blair,
14 309 F.R.D. at 629, where the court denied Rule 23(b) (3)
15 certification in a TCPA case because of individualized questions
16 regarding class member consent. Critically, however, the Blair
17 court emphasized that the defendant in that case had provided some
18 evidence that all of the named Plaintiffs had consented, in varying
19 ways, to receive phone calls from the defendant. Blair, 309 F.R.D.
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21 ³ Plaintiff has submitted evidence, for example, that class
22 members notified Enagic officials that distributors were improperly
23 utilizing auto dialer and robo-calling devices, and that Enagic not
24 only failed to take any disciplinary action against distributors,
25 but also threatened to seek recovery of legal fees and costs if
26 class members sought to hold Enagic liable. Plaintiff has also
27 submitted evidence of Enagic policies that forbid distributors from
28 using their own marketing materials and require distributors to use
advertising methods approved by Enagic, but do not explicitly
forbid the use of auto dialer or robocall technology, stating
instead that "[t]he use of the Company's name or
copyrighted materials may not be made with automatic calling
devices or "boiler room" operations either to solicit
distributors or retail customers. (Friedman Decl., Ex. 4 ¶ 54)
(emphases added.)

1 at 629. See also Connally, 294 F.R.D. at 578. As the Caldera court
2 explained, however, “[w]here a party has not submitted any evidence
3 of express consent, courts will not presume that resolving such
4 issues requires individualized inquiries.” Caldera, 320 F.R.D. at
5 519 (quoting Bee, Denning, Inc. v. Capital All. Grp., 310 F.R.D.
6 614, 629 (S.D. Cal. 2015)) (internal alteration omitted).
7 Defendant’s speculation that individual class members may have
8 consented to receive auto dialed or pre-recorded phone messages is
9 therefore insufficient to demonstrate that individual questions of
10 consent predominate.⁴ Accordingly, certification of a damages class
11 pursuant to Rule 23(b)(3) is appropriate.

12 C. Failsafe Class

13 Lastly, Defendant argues that the proposed class should not be
14 certified because it is a “failsafe class.” Failsafe classes are
15 defined in terms of success on the merits of the case in a way where
16 “whether a person qualifies as a member depends on whether the
17 person has a valid claim.” Messner v. Northshore Univ.
18 HealthSystem, 699 F.3d 802, 825 (7th Cir. 2012); Mullins v. Direct
19 Digital, LLC, 795 F.3d 654, 660 (7th Cir. 2015). The Ninth Circuit
20 has yet to opine on the propriety of failsafe classes. See Pepka v.
21 Kohl’s Dep’t Stores, No. CV-16-4293, 2016 WL 8919460, at *3 (C.D.
22 Cal. Dec. 21, 2016). Indeed, one Ninth Circuit court has observed,
23 without holding, that Ninth Circuit “caselaw appears to disapprove
24 of the premise that a class can be fail-safe.” Melgar v. CSK Auto,
25 Inc., 681 F. App’x 605, 607 (9th Cir. 2017) (citing Vizcaino v. U.S.

26
27 ⁴ Defendant also argues, without elaboration, that
28 individualized questions of standing predominate. The basis for
this argument is not clear to the court.

1 Dist. Court for W. Dist. of Washington, 173 F.3d 713, 722 (9th Cir.
2 1999). Some courts, however, have held that failsafe classes should
3 not be certified because they only allow for two possible results:
4 either the class members win, or, "by virtue of losing," fall
5 outside the definition of class membership and are thus not bound by
6 the judgment. Messner, 699 F.3d at 825; see also Pepka, 2016 WL
7 8919460 at 3-4.

8 This Court need not determine whether failsafe classes are
9 appropriate because the class proposed here is not a failsafe class.
10 As discussed above, the predominant question here is whether Enagic
11 is vicariously liable for auto-dialed or robocalls made by
12 distributors. Should Enagic prevail on that question, class members
13 who received phone calls from an Enagic distributor will not fall
14 outside the parameters of the defined class, will be bound by the
15 judgment, and would be barred by res judicata from re-litigating
16 their claims against Enagic. See Mullins, 795 F.3d at 661.

17 **IV. Conclusion**

18 For the reasons stated above, Plaintiff's Motion for Class
19 Certification is GRANTED. The court certifies a class comprised of
20 all persons within the United States who received a telephone call
21 from Defendant or one of its Distributors, on said Class Member's
22 telephone made through the use of any automatic telephone dialing
23 system or an artificial or prerecorded voice, between July 8, 2011
24 and Present. The court also certifies the following subclasses:
25

26 (1) Prerecorded Voice Subclass, comprised of all persons within
27 the United States who received a telephone call from Defendant
28 or one of its Distributors, on said Class Member's telephone

1 made through the use of any system that utilized an artificial
2 or prerecorded voice, between July 8, 2011 and Present;

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4 (2) Cell Phone Subclass, comprised of all persons within the
5 United States who received a telephone call from Defendant or
6 one of its Distributors, on said Class Member's cellular
7 telephone made through the use of any automatic telephone
8 dialing system or an artificial or prerecorded voice, between
9 July 8, 2011 and Present;

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11 (3) Prerecorded Voice Cell Phone Subclass, comprised of all
12 persons within the United States who received a telephone call
13 from Defendant or one of its Distributors, on said Class
14 Member's cellular telephone made through the use of any system
15 that utilized an artificial or prerecorded voice, between July
16 8, 2011 and Present; and

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18 (4) Prerecorded Voice Cell Phone 2015 subclass, comprised of
19 all persons within the United States who received a telephone
20 call from Defendant or one of its Distributors, on said Class
21 Member's cellular telephone made through the use of any system
22 that utilized an artificial or prerecorded voice, between
23 January 1, 2015 and December 31, 2015.

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1 Plaintiff is appointed Class Representative and Plaintiff's
2 attorneys are appointed as Class Counsel.

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4 IT IS SO ORDERED.

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6 Dated: March 13, 2018

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DEAN D. PREGERSON
United States District Judge